United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7115

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 75-7115

FIREBIRD SOCIETY, ET AL

Plaintiffs - Appellees

V.

MEMBERS OF THE BOARD OF FIRE COMMISSIONERS, CITY OF NEW HAVEN, ET AL

Defendants - Appellees

THE FIREFIGHTERS COMMITTEE TO PRESERVE CIVIL SERVICE, ET AL

Intervenors - Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANTS - APPELLEES

Board of Fire Commissioners
City of New Haven, et als

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TABLE OF CONTENTS

STATEMENT OF THE CASE

The Defendants-appellees (hereinafter defendants) rely for their statement of the case on the full statement set forth in the opinion of the court below. Certain points should however be underlined.

First, the orders of the Court with respect to recruitment were entered December 5, 1973. No objection was made to those orders until September of 1974, after a recruiting program had been completed and arrangements begun to hire firefighters in reliance on the orders of the court. The Order of August 30, 1974, which appellants propose to reopen, simply restates the provisions of the order entered nine months earlier with respect to recruitment. This brief therefore does not address the question of recruitment; it is the position of the defendants that re-opening and setting aside an order nine months after its entry and after thousands of dollars have been spent by the defendants in compliance with that order would be patently unjust.

Second, appellants object to the notice given in this case. Notice was given by defendants by posting copies of the Court's temporary Restraining Order, plaintiffs' claims for relief, and a covering notice informing all members of the Department of their opportunity to intervene in the law suit if they so desired. App. 204A-210A. Notices are posted in the firehouses in order to be seen. Members of the Department as part

of their duties are held responsible for awareness of the contents of notices so posted. This particular notice was the subject of much discussion in the Firehouses, and of course, no appellant denies seeing or reading it. App. 146A.

ARGUMENT

I. APPELLANTS HAD AMPLE NOTICE AND OPPORTUNITY TO INTERVENE BEFORE JUDGMENT.

As early as October 1973, the parties to this action agreed to post in each fire house a notice explaining the nature of the lawsuit with an invitation to interested firemen to intervene, a list of remedies plaintiff sought, and a copy of the Court's preliminary injunction. (App. 204A-210A). The parties were under no legal compulsion to do this; neither the Federal Rules nor the Equal Opportunities Act require that notice be given all employees of a defendant employer, nor have defendants produced any case precedent compelling it. Nonetheless, with a view towards involving those firemen interested in participating in the negotiations, notice was posted. In addition, dissemination of information concerning the Court's Order of December 5, 1973, which dealt with the Department's hiring and promotional practices, occurred through wide coverage in the news media. (App. 211A-222A.)

Under these circumstances, appellants cannot now be heard to claim they were unaware of allegations of discrimination. On the contrary, there is significant evidence that the suit was a general topic of conversation among the firemen during the entire period of negotiations which led to the August, 1974 settlement. As the Court below noted,

"In addition to counsel of record, Attorney W. Paul

> Flynn appeared and stated that although he was counsel for the New Haven Fire Fighters Local No. 825 ("Union"), he was not formally entering an appearance for the Union. However, he did wish to file a motion to intervene in behalf of the 17 white captains whose assignment to duty was enjoined by this Court's order of October 5, 1973. The motion to intervene was orally granted and thereafter Attorney Flynn played an active role in the negotiations. " (App. 135A).
>
> "In addition, however, there were 23 chambers conferences, some of which extended long into the evening. These meetings were held with the knowledge and approval of all counsel of record and included, at one time or another; the attorneys for the parties and intervening defendants, high ranking officials of the City, officers of the Union, individuals named as defendants including the Chairman and several members of the Board of Fire Commissioners, certain white firemen who were not named as parties, the Chief of the Department, and others." (App. 136A). (Emphasis added)
>
> "In fact, on occasions, counsel informed the Court that at union meetings or while they visited firehouses throughout the City, they were 'grilled' on the latest developments and felt obliged to respond." (App. 137A).

And the intervenors themselves asserted in their offer of proof that

> "(6) At one point, at least (sic) one of the intervenors, including Albert Serletti, attempted to gain access to one of the chamber conferences but was denied access. He was told by person to (sic) believed to be the trial court's secretary that he could not come in because he did not have an attorney." (App. 85A).

II. THE INTERESTS ASSERTED BY APPELLANTS WERE PROTECTED BY THE DEFENDANTS.

Appellants assert that none of the defendants was an adequate

representative of their interests, which they define as an economic interest in advancement according to merit and an interest in job safety through promotion only of qualified men to supervisory positions. The legitimate interests asserted by the intervenors were fully protected by the defendants and by the Court's Order of August 30.

A. The Named Defendants Effectively Represented the Interests Now Asserted by the Appellants in Job Safety and Preservation of a Merit System.

The named defendants in this action include the members of the New Haven Board of Fire Commissioners, members of the New Haven Civil Service Commission, the Chief of the New Haven Department of Fire Services, the Mayor of the City of New Haven, and the City itself. What are the interests of these defendants? Each has been designated a different responsibility, but in this action, each was concerned with maintaining a meritorious fire department which functions efficiently in serving the city. Not one had any conceivable interest in sacrificing the high quality of the Department.

To the contrary, it is the duty of all the defendants precisely to insure the continued high quality and good safety record of the New Haven Department of Fire Services. The duties of the Fire Chief, for example, established by City Charter, are to "be responsible for the efficienty, discipline, and good conduct of the department of fire services." Charter, City of New Haven, Sec. 119.

Throughout this litigation, the overriding interest of all the defendants was to protect the interests in job safety and merit hiring and promotion now asserted by the appellants. Defendants believe they succeeded admirably in protecting those interests. The merit promotional system and the effectiveness of the Department were preserved by the provisions of the Court's Order and earlier agreements which provide that 1) no persons shall be "bumped" or displaced from their jobs; 2) that hiring and promotion shall continue uninterrupted by litigation or the long delays necessary, for example, if the court were to order no lieutenancy positions to be filled until large numbers of blacks became eligible to take the examination for lieutenant or until development of a validated Lieutenant's Examination; and, most importantly, 3) because the defendants did not acquiesce in the Court's order without knowing who the seven blacks to be promoted to lieutenant were.

Also, the City feels that minority representation in its officers' ranks will enable it to do a fully effectively job of working with and within the New Haven community. A brand new firehouse has just opened in the heart of one of New Haven's predominantly black neighborhoods. Another firehouse is in another such neighborhood. In order to serve the community, the Fire Department must work with the community and win its trust and confidence.

B. The Economic Interests Asserted by Appellants Were Represented by the Defendants and Protected by the Court's Order.

It is first necessary to determine what economic interests the appellants actually have at stake in their effort to reopen the Court's August 30 order. Plainly the only persons with an arguable interest are those on the lieutenants' list who stand below the twenty-eight who must be appointed under the terms of the court order. Men who are now officers have no litigable interest in who else becomes an officer; men on the list for promotion could claim only the prejudice of delay, and surely affirmance of the court's order below is the surest way to minimize delay in promotions.

As for the men below number twenty-eight on the court-ordered promotion list, their economic interest is reduced by at least two factors: first, the test by virtue of which the list was generated has never been claimed by the City, which had it prepared and which administered it, to be validated or to comply with the requirements of Title VII. Therefore, if the list were not modified as it was by the settlement it would have to be jetisoned entirely and another test given. Second, the City has the power in any event not to promote a person whose name appears on a promotional list. Promotions must follow the "rule of three" which means in short that the City may for any reason pass over two persons on any promotional list. High standing on a list confers no vested right to promotion. The defendants vigorously defended and

successfully protected all the legitimate economic expectations now asserted by the intervenors. It was our position throughout that any settlement had to protect both the jobs and the proposed assignments of every white firefighter. This result was achieved first by the concessions of the plaintiffs secured during the course of negotiations and second, by the "slotting in" procedure on the lieutenants' examination. Under this procedure all whites who would have been promoted will be promoted, and seven blacks will be promoted as well. (The extra appointments are possible because of the city's power to make appointments for vacancies which are not yet available. Assignment of the new lieutenants will be made as vacancies arise.)

Finally, the settlement does not establish a quota promotional system, in that the city contemplates a future policy of promoting strictly according to standing on a validated promotional examination. The interests of appellants are thereby further protected: they are not exposed to the danger of quota promotions in the future.

Reduced in its essence, the economic harm appellants claim is that seven lieutenancies have been filled and therefore are for a period of time unavailable to them. But none of the four hundred privates in the fire department has a claim of right to any of those seven lieutenancies; and the City could diminish the number of officers tomorrow from one hundred to ninety-three without thereby depriving any firefighter of any interest which he has a right to ask this court to protect.

The interest of four hundred privates in having seven more lieutenancies available is more than out-weighed by the interests of persons already scheduled for promotion in being promoted and the interests of everyone in the Fire Department in having promotions proceed expeditiously rather than being delayed litigation. If this case is reopened, tried and appealed, it is likely that dozens and dozens of men will be denied promotions for years, and that hiring will be commensurately delayed because of the shortage of officers. The economic damage wrought be such a course far outweighs the speculative interests asserted by appellants.

C. The Appellants Do Not Represent the Interests of All White Firefighters.

Appellants claim the defendants could not represent them because of a conflict of interest arising from the City's interest in avoiding assessment of damages against them. But appellants cannot represent and are not representing the class of white firefighters they purport to represent. They cannot represent all those firefighters who have been represented by Attorney Flynn, who owe their jobs and promotions to the court order. They cannot represent any of the twenty-one whites who will be promoted under the terms of the settlement but probably would not be without it since a new examination would have to be given. (Some of these men are appellants' they cannot speak for their fellows.) They cannot speak for the white recruits awaiting appointment under the

terms of the court's order. If the litigation were reopened new conflicts would arise with respect, for example, to time-in grade requirements. The interests involved can be sliced innumerable ways: appellants should not have the power to veto a settlement and force a trial when, as we have argued here, no legitimate interests of theirs have even been harmed.

III. THE NEGOTIATION PROCEDURE IN THIS CASE WAS FAIR AND IN THE INTEREST OF THE PARTIES AND APPELLANTS.

Appellants are dissatisfied with the results of settlement negotiations in this case and now claim the negotiation procedures were unfairly secretive and designed to keep them in ignorance. They misconstrue the nature and purpose of the negotiations.

As has been pointed out, appellants were invited to intervene in the action. They chose not to do so, but, as the settlement stands, their interests were well-protected. The "off the record" in camera proceedings were maintained in order to allow for a broad, candid exchange of ideas, free from the glare of exaggerated publicity. The defendants sought to avoid any sense among the public that their fire department was in the midst of an upheaval that would undermine the effectiveness of its service. It was further believed that positions on all sides would be more fluid if not publicized. The very reasonableness of the final settlement serves to confirm the highest hopes of the parties, for it allows for a relatively unturbulent transition to a more representative, stronger department.

IV. REOPENING THE JUDGMENT AT THIS POINT WOULD HARM THE NEW HAVEN DEPARTMENT OF FIRE SERVICES AND UNDO IMPORTANT GAINS WON DURING THE NEGOTIATIONS.

The progress of this case has been relatively free from those tensions and stalemates which so often plague suits of this kind. The defendants are assured that the interests of its firefighters are protected, and the quality of the Fire Department ensured. Throughout the negotiations defendants have sought to protect the public by assuring the continuance of an efficient department, composed of qualified employees, by avoiding, as much as possible, publicity exaggerating divisiveness within the department. A re-opening of the case could well defeat these efforts, and to no valid end. The changes wrought by the settlement are necessary and productive. While we would have approved of appellants' participation in the negotiations, we cannot believe re-opening of the case, solely to allow for their expression of what defendants have already expressed, is warranted by the circumstances.

Such a re-opening can only be disruptive to the firefighters, the department, and the City. Those parties who, in good faith, and with extensive effort, participated in the negotiations will be left to suffer unnecessary delays in fruitless litigation. Assignments and promotions effectuated during the negotiation period will be vacated, and potentially all promotions made on the basis of invalid testing procedures will be made on the basis of invalid testing procedures will be threatened.

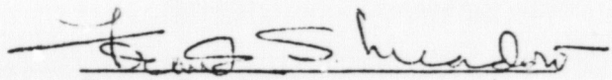
Progress toward more equitable hiring and promotional practices will be thwarted, the implementation of improved examinations delayed, and the City's need for new officers remain unfulfilled. Both within and without the firehouses racial tension will be exacerbated, and in the midst of such tension equitable solutions will be increasingly difficult to obtain.

There are absolutely no compelling reasons to risk such a result. In the absence of unusual or compelling circumstances, an application to intervene subsequent to the entering of judgment must be denied. App. 146; Barron and Holtzoff, Fed. Prac. and Proc. 2 Sec. 594. Appellants have failed to give valid reasons for such untimely intervention. An equitable judgment is unnecessary, unwarranted and runs the risk of defeating the very purposes which led to a meritorious settlement.

CONCLUSION

For all the reasons stated, the Court below acted well within its discretion, the appellants have been treated fairly in both a procedural and a substantive sense, and the judgment below should be affirmed.

Respectfully submitted,



Frank S. Meadow

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing Brief was mailed first class postage prepaid this 9th day of April, 1975 to the following:

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13-14